No. 16335

United States
COURT OF APPEALS
for the Ninth Circuit

DEWEY J. O'BRIEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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BASIS OF JURISDICTION

This is an action for damages against the United States of America for personal injuries, based upon the alleged negligence of the defendant (R. 12, 13). It is stipulated in the Pre-Trial Order that the action was commenced under the Federal Tort Claims Act of June 25, 1948, 28 USCA § 1346(b) and 28 USCA § 2674 (R. 10).

On the 24th day of October, 1958, the Hon. Gus J. Solomon, District Judge, entered judgment in favor of defendant (R. 30). On December 17, 1958, plaintiff filed his notice of appeal (R. 31). This Court has jurisdiction of the appeal under the provisions of 28 USCA § 1291.

STATEMENT OF THE CASE

Plaintiff suffered the personal injuries which are the basis of this action when a dead tree located on forest lands belonging to the United States fell across the highway, striking the truck in which he was a passenger (R. 10). He brought this action under the Federal Tort Claims Act, and the segregated issue of liability was tried to the District Court (R. 10).

Plaintiff relied upon the admitted fact that the defendant had not inspected the snag before the accident (R. 10), the fact that the tree was visible from the highway (R. 40), was obviously dead (R. 40) and had been dead for many years (R. 62). Defendant contended that the tree was not readily visible (R. 40), that a dead tree was not necessarily a dangerous tree (R. 27), and that in any event, there was no duty on the part of the United States to inspect trees growing along a rural highway in order to protect travellers from the danger of dead trees falling (R. 14).

The trial court found that the Forest Service employees knew that it could reasonably be anticipated that some of the trees in the tract in question would be

dead, but that they did not know of the existence or condition of the particular tree which injured plaintiff (R. 26-27). He concluded that, although the question was one of first impression under Oregon law (R. 22), the Oregon court would not impose upon landowners the duty to inspect and remove dangerous trees along rural roads (R. 25). He therefore held that there was no duty on the part of the United States to inspect its property for the purpose of preventing injury to travellers on the highway and that there had been no negligence on the part of defendant (R. 29).

SPECIFICATIONS OF ERROR

1. The Court erred in making the following Conclusion of Law (R. 29):

> "2. Under the facts of this case, the United States and its employees had no duty to inspect its property or objects thereon for the purpose of insuring that the highway would not be so obstructed."

Plaintiff contends that the Court should have found that the defendant United States had a duty to make such an inspection as a reasonable and prudent landowner would have made under the same or similar circumstances, for the purpose of seeing to it that its use of its own property did not involve an unreasonable risk to persons lawfully using the public highway.

2. The Court erred in making the following Finding of Fact (15) and Conclusion of Law (3) (R. 28, 29):

"15. The failure of the Defendant's employees to inspect the trees which fell was not negligence, and neither the United States nor any of its agents or employees was guilty of any negligent or wrongful act or omission proximately causing damage to the plaintiff."

"3. The injury to the Plaintiff was not caused by the negligence of the United States or its employees."

Plaintiff contends that the Court should have found that the admitted failure of the defendant to make any inspection whatsoever was negligence; that on the facts of this case the defendant had at least constructive notice of the danger from the dead tree, and that its failure to take any steps to protect the travelling public was negligence. The Court should then have determined whether such negligence was a proximate cause of plaintiff's injuries.

SUMMARY OF ARGUMENT

The trial court erred in determining that there was no duty imposed upon the owner of land adjoining a highway to inspect timber growing thereon for the purpose of safeguarding travellers upon the highway. The imposition of a duty does not necessarily mean a responsibility to actually conduct an inspection; it simply means that defendant, which obtains the economic benefit of the timber, should also have placed upon it the economic burden of either preventing loss, or providing compensation for avoidable injury. The economic burden thus imposed, by way of either inspection or insur-

ance, is not large, whereas the economic burden placed upon the innocent injured party may be tremendous.

The cases upon the subject are divided, but legal scholars agree that the trend in the field of damage caused by trees falling across highways is toward the imposition of liability. The Oregon Supreme Court has uniformly held that the standard of reasonable care is all-pervasive. Even though the care required from situation to situation may vary, the standard remains the same.

Applying that standard to this case, the conclusion is that resonable care required some duty of inspection. Whether the inspection would have been such as to discover and remove this particular tree, thereby preventing the injury to plaintiff, is a factual issue which the trial court did not find it necessary to determine because of his conclusion that there was no duty to inspect. The cause should therefore be remanded for the application of the appropriate standard of care to the facts of the case.

ARGUMENT

A. Introductory Statement.

The issue presented by this case is what, if any, responsibility does the owner of property adjoining a highway have for the safety of the traveling public with respect to dangers caused by the existence of natural conditions upon the landowner's property. The problem arises in the context of the Federal Tort Claims Act (28

USCA § 1346(b)). The factual circumstances are that a tree adjoining a highway in the Willamette National Forest fell across the highway and struck the vehicle in which plaintiff was riding, causing him severe injuries.

It was admitted that the defendant had made no inspection of the area for dangers to the highway (R. 10). The trial court concluded that there was no duty upon the part of the government to make any such inspection (R. 29). He therefore found that the government was not liable to plaintiff and entered a judgment in its favor (R. 30).

It is axiomatic that the issues of this case are to be determined by Oregon law, that being "the place where the act or omission occurred." 28 USCA § 1346(b). It is agreed by all concerned, including the court below (R. 22), that there are no Oregon cases in point, and it therefore becomes the duty of the Court to make a prediction as to what rule the Supreme Court of Oregon would adopt if the question were before it. There does not, in fact, even appear to be any closely analogous authority in Oregon, such as a decision on some other aspect of a landowner's liability to persons outside the land for other types of natural conditions.

An Oregon case which does have some bearing on the subject, in that it involved the logging industry and the effect on natural conditions of certain activities thereof, is *Schweiger vs. Solbeck,* 191 Or. 454, 230 P. 2d 195 (1951). In that case, a logger permitted slashings to accumulate in a ravine, which combined with a landslide

and an unusually heavy rainfall to cause a diversion of the natural flow of water resulting in a washout and damage to plaintiff's property. The Court stated:

> "It would seem, therefore, that, even assuming that there was a landslide, the negligence of the defendants in permitting an accumulation of logging debris to remain on their land might well have been a cause concurring with the landslide to bring about the injury, in view of the tendency of the soil to slide when saturated with water. Act of God, under those circumstances, would not be a defense."

This case not only establishes the duty of a landowner in Oregon to take into account relevant natural conditions in connection with the exercise of due care in the use of his property, but also demonstrates that, contrary to the implication of the trial judge's opinion, there has been no reluctance upon the part of the Oregon Court to impose upon the lumber industry the burdens of so operating its business as not to cause injury to others.

B. The Decisions of Other Courts.

The decisions from other jurisdictions relating to falling trees, including a number of English and Canadian cases, are collected in an annotation at 11 A.L.R. 2d 626. These authorities demonstrate that the courts have gone in a diversity of directions when confronted with this issue, and have considered a variety of factors in reaching their decisions.

Two Circuit Courts of Appeal have considered the question. In *Chambers vs. Whelen,* 44 F. 2d 340 (C.C.A. 4, 1930), the Court held that no duty of inspection ex-

isted where a person was injured by the falling of a dead tree while traveling along a public highway in a rural area. In that case, the statutes of West Virginia expressly required highway officials of the state to remove all dead timber standing within fifty feet of the highway, and imposed no such duty on the landowner. The Court affirmed the judgment sustaining a demurrer.

On the other hand, in the later case of *Brandywine Hundred Realty Co. vs. Cotillo,* 55 F. 2d 231 (C.C.A. 3, 1931), the Court held that a judgment for plaintiff must be affirmed, in a case arising from the fall of a dead tree on a tract of suburban forest land abutting a road. The tree had been dead for four years, but bore no exterior evidence of decay.

The Court stated:

> "After all is said and done, this case turns on the application of the time honored principle of law, 'sic utere tuo ut alienum non laedas'—so use your own as not to injure another. Of the right of the plaintiff to drive along the public road there can be no question. And of the duty of an abutting landowner to so use his property on his own land that it shall not cumber the highway and endanger the safety of those using it there would seem to be no doubt. Responsibility for the control of one's property is one of the burdens of ownership, and, as a landowner has the right to enjoy his property unhampered by the actions of his abutting neighbor, so his abutter, whether the abutter be a neighbor or the traveler using a highway, is entitled to the same immunity."

The Court therefore held that the landowner would have a duty to exercise reasonable care and diligence to

prevent the tree from falling if its condition was known or in the exercise of reasonable care could have been known. A petition for rehearing was denied.

In the case of *Medeiros vs. Honomu Sugar Co.,* 21 Hawaii 155 (1912), the Court held that the liability of a landowner for a tree falling from rural land adjoining a highway rested upon the same principle as that of the owner of a building or any other structure abutting a street.

In *Brown vs. Milwaukee Terminal Railway Co.,* 199 Wis. 575, 224 N.W. 748, 227 N.W. 385 (1929), the Court, on rehearing, affirmed a jury verdict for plaintiff. In that case, the tree was in an urban area, but that fact did not seem to be of significance to the Court's opinion. In answer to specific interrogatories, the jury had found that the tree was dangerous and that the defendant should have known it in the exercise of ordinary care in time to remove it. The Court held that a cause of action for damages for the maintenance of a nuisance had been established.

Also finding liability is an English decision, *Brown vs. Harrison,* 177 L.T.R. (N.S.) 281 (C.A. Eng. 1947); and a Canadian decision, *Lamarche vs. Les Reverends Peres Oblats,* Rap. Jud. Quebec 29 C.S. 138 (1905).

In what is apparently the most recent American decision on the subject, *Hay vs. Norwalk Lodge No. 730, B.P.O.E.,* 109 N. E. 2d 481 (Ohio App., 1951), the Court followed very closely the analysis of the *Cotillo* case, supra. It held that the maxim that one must so use his

own property as not to injure another governed, and repeated the comment that, "Responsibility for the control of one's property is one of the burdens of ownership." The Court held that the governing standard was one of reasonable care.

In determining that the complaint stated a cause of action, the Court relied upon the fact that actual notice was alleged, and stated that there was no duty to inspect trees growing on rural land. The land in this case was not commercial timber land, but merely rural land on which an old tree was growing. That even the statement made about inspection was too strong, however, is shown by the Court's later statement, as follows:

> "If the danger is apparent, which a person can see with his own eyes, and he fails to do so with the result that injury results to a traveler on the way, the owner is responsible because in the management of his property he has not acted as a reasonably prudent landowner would act."

Thus, applying the standard of reasonable care to the facts of this particular case, the Court determined that there is at least a duty to look and to see what is obvious, even if there is no duty to make a detailed inspection. Clearly, some duty is held to exist, and it is measured by the standard of reasonable care.

C. The Real Issue Is Who Must Bear the Burden.

The resolution of the issue presented by this case presents a policy question to this court for determination. The trial court very frankly placed his decision upon economic factors, and upon his belief that the im-

position of a duty to inspect would be an "intolerable burden on the landowner" (R. 24). He stated (R. 25):

> "The economy of Oregon is largely dependent upon the lumber industry. Millions of acres of land in Oregon are in natural forests. It is unthinkable that the Oregon courts would impose upon the owners of forest lands, adjacent to little-used roads in sparsely-settled areas, the duty to inspect and remove trees which are likely to fall because of natural decay."

Plaintiff also believes that economic factors should determine the ultimate result of this case, but approaches the issue from an entirely different point of view. We respectfully submit that the fallacy in the learned trial court's analysis arises from an uncritical use of the word "duty." A duty in law is not at all the same kind of moral imperative as is a duty in ethics or religion. It is merely a correlative of the right of plaintiff to travel safely. When we place upon a landowner a duty to inspect, we do not necessarily intend or expect that he will in fact make an inspection. We are simply placing upon him the economic burden of any loss which may be caused by a disaster which could have been avoided had he done so.

As stated by Dean Prosser in his work on Torts (2d ed., p. 172):

> "The real problem, and the one to which attention should be directed, would seem to be one of social policy: whether the defendants in such cases should bear the heavy negligence losses of a complex civilization, rather than the individual plaintiff. Because these defendants are in large measure public utilities, governmental bodies, industries, automobile

> drivers, and others who by rates, prices, taxes or insurance are better able to distribute the loss to the general public, many courts may reasonably consider that the burden should rest upon them, and experience no great difficulty in finding a 'duty' of protection. So far as policy is concerned, different answers might well be given in different communities, according to the view that is taken as to where the loss should fall; but the issue is not to be determined by any talk of 'duty' or an assumption of the conclusion."

It is possible to question whether the making of an occasional, visual inspection of 3000 miles of road (not all of it public) through the Willamette National Forest would be such an intolerable economic burden as the trial court apparently believed, but that is not the point. As a practical matter, it is most unlikely that such an inspection would be made, although the imposition of a duty might, in the most obvious and serious cases, cause dangerous trees to be removed which might otherwise be ignored. The consequence of such a duty would not be an intolerable economic burden; it would merely require the government, in the case of government timber, or the private landowner, probably through insurance, to assume the economic burdens of avoidable losses caused by the timber from which he obtains such substantial economic benefits. A "duty to inspect" is merely a way of placing on the owner of the timber the liability to compensate a person injured by the failure to take a feasible precaution.

It hardly needs stating that there are many circumstances under which a "duty" is imposed, with no in-

tention that the duty be in fact fully carried out. Under the Oregon Employers' Liability Act, O.R.S. 654.305, et seq., for instance, all persons engaged in work involving risk or danger to employees are required to "use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices." No one really expects that the employer will search the world over for every practicable safety device, such as one used in Switzerland, but unknown in this country (*Camenzind vs. Freeland Furniture Co.,* 89 Or. 158, 174 P. 139 (1918)); it is merely intended that if the employee is injured through the failure to take a practicable precaution, the employer must compensate him for the injury.

Similarly, no one seriously expects the operators of elevators or of common carriers to use the "highest degree of skill and foresight consistent with the efficient use and operation of said elevator." *Kelly vs. Lewis Inv. Co.,* 66 Or. 1, 133 P. 826 (1913). The duty imposed is merely another way of saying that the failure to take such precautions will subject the operator to liability to a person injured. Again, it is not anticipated that the bottlers of soft drinks will investigate each and every bottle going out of their plant for mice or cigar stubs; nevertheless, a duty is imposed to see to it that no such foreign substances are found therein, if reasonable care could have prevented such a result. *Keller vs. Coca Cola*

Bottling Co., 67 Or. Adv. Sh. 197, 330 P. 2d 346 (1958). Examples could be multiplied indefinitely.

The trial court apparently fails to recognize that by his opinion he places the entire, intolerable economic burden upon plaintiff. Plaintiff was an innocent traveler along a public highway. He could not have done anything about this tree had he been aware of it. Defendant owned the land on which the tree was located, and did not permit even the State Highway Department to remove such trees without first obtaining defendant's permission for the removal of each individual tree (R. 51, 72, 87), a permission which was not always granted (R. 72). One of the trees fell, and plaintiff was injured. The court holds that the economic burden of this occurrence must be borne entirely by plaintiff.

In actual fact, the very reasons which the court advances for the unthinkability of inspection—that the roads are little used and in sparsely settled areas—render the economic burden light indeed. As the Court pointed out in *Chambers v. Whelen,* the danger, "in the case of rural lands upon a country road, is, to say the most, a very remote one." For that very reason, the economic burden of insurance against such a loss is not likely to be substantial. The economic burden upon the unfortunate individual who, deriving no advantage from the timber, finds himself crushed by it, is immense.

The issue, then, is not one of whether there is a duty to inspect. This, as Dean Prosser points out, is assuming the conclusion. The real issue is whether the landowner or the innocent member of the traveling public must

bear the burden of a disaster which could, by an appropriate expense of time, money and effort, have been avoided. We do not suggest that there is an absolute liability. For a true Act of God, the landowner is not liable. But where he could, by taking reasonable precautions, have prevented the accident from occurring, we submit that it is a question for the trier of fact whether a reasonable man would have taken such precautions, and whether their omission was a proximate cause of the injuries which occurred.

The trend of tort law in all areas has been to broaden the base of liability for injuries due to avoidable causes. Under the opinion of the court below, the landowner is entitled to sit back, reaping the harvest of the economic wealth of his forests, and say to the traveling public: "By traveling on the public roads through my lands you assume the risk of any dangers that may exist. If a tree falls, that is your hard luck, not mine. I do not have to take any steps to prevent it happening, or even permit others to do so, and I do not have to pay any compensation if it occurs."

We submit that rather than take this position, the Oregon Supreme Court would, if the question were presented to it, follow the trend of tort law the country over and place the duty—that is, the economic burden—on the only person who is not only able to spread the risk, but to avoid it.

D. The Standard of Reasonable Care Should Apply.

Such a decision would be in accordance with general principles of tort law as applied in Oregon. The trial

court's decision carves out an area of immunity from liability; an area in which an individual is under no obligation to use any care whatsoever for the protection of his fellows. In all areas of tort law, in Oregon, however, the standard of care required is that of the ordinary prudent man. As the Court recently stated in *Biddle vs. Mazzocco,* 204 Or. 547, 554, 284 P. 2d 364 (1955):

> "Negligence, in the absence of statute, is defined as the doing of that thing which a reasonable person would not have done, or the failure to do that thing which a reasonably prudent person would have done, in like or similar circumstances; it is the failure to exercise that degree of care and prudence that a reasonably prudent person would have exercised in like or similar circumstances. Ordinary negligence is defined in other words, but in the final analysis, and in every definition, the test of the conduct under consideration is based upon the conduct of a reasonably prudent person in like or similar circumstances."

Moreover, this standard does not change. Circumstances may change, necessitating a different degree of care, but the standard is always that of an ordinarily prudent person. *Sullivan vs. Mountain States Power Co.,* 139 Or 282, 298, 9 P. 2d 1038 (1932). The care to be exercised is proportionate to the seriousness of the possible consequences, and a high degree of danger calls for a high degree of care, which, under those circumstances, is ordinary care. *Suko vs. Northwestern Ice Co.,* 166 Or. 557, 571, 113 P. 2d 209 (1941). As the Court noted in the *Suko* case, in which liability was imposed for the collapse of a water tank:

> "The location of the tank here involved, above a busy thoroughfare in a large metropolis, required a

> greater degree of care in its maintenance and use than would have been the case had it been located in a remote and 'lonely' district."

The important point, however, is that the standard of ordinary care follows the tank whether it is above a crowded thoroughfare or in a lonely district. Likewise, the standard of ordinary care follows the landowner whether his land be alongside a city thoroughfare or in a rural district. Whether a reasonable inspection, under the circumstances of this case, would have discovered the danger of this tree, which had been rotten for fifteen or twenty years (R. 62), was for the trier of fact to determine. An inspection for dead trees sufficient to include this area at least once every ten years does not seem to be such an intolerable burden, and perhaps a trier of fact might consider it reasonable. Perhaps he might impose a higher standard, in view of the dangers, but the yardstick of the ordinary reasonable man is always the test.

E. "Judicial Legislation" Is Recognized by the Oregon Court as Necessary and Desirable.

The creation of a new "duty" by "judicial legislation," although it appears to alarm some courts, has not disturbed the Oregon Supreme Court in the recent past. In the landmark decision of *Hinish vs. Meier & Frank Co.*, 166 Or. 482, 504, 113 P. 2d 438 (1941), that Court embraced the doctrine of a right of privacy, relying not only upon English and American decisions, but upon the views of legal scholars as expressed in law reviews and treatises. The Court stated, at 166 Or. 504:

> "We should not be deterred by fear of being accused of judicial legislation. Much of our law is judge-made, and there are those who think that it is the best law. Cardozo, 'The Growth of the Law', p. 133. The common law's capacity to discover and apply remedies for acknowledged wrongs without waiting on legislation is one of its cardinal virtues. The so-called 'family purpose doctrine', approved by this court in *McDowell v. Hurner,* 142 Or. 611, 13 P. (2d) 600, 20 P. (2d) 395, 88 A.L.R. 578, is a creation of the courts, and so, as Mr. Justice Bailey points out in the opinion in that case, are the defenses of fellow-servant, assumption of risk and contributory negligence. Courts cannot, of course, as Sir Frederick Pollock says in 'The Expansion of the Common Law', p. 49, 'lay down any rule they choose'. He continues, however: 'They may supplement and enlarge the law as they find it, or rather they must do so from time to time, as the novelty of questions coming before them may require; but they must not reverse what has been settled.' "

This very language has been quoted with approval as recently as 1954 in the case of *Kleinschmidt vs. Matthieu,* 201 Or 406, 414, 269 P. 2d 686 (1954), in imposing a theretofore non-existent liability for libel by will. The Court reviewed the few authorities on the subject, and cited with approval the works on torts of Dean Prosser and Professor Harper.

Similarly, in recent decisions, the Court has created a liability of a father to a minor child for wilful misconduct in *Cowgill, Adm'r vs. Boock, Adm'r,* 189 Or 282, 218 P. 2d 445 (1950); has established a liability of one spouse to another for an intentional tort in *Apitz vs. Dames,* 205 Or. 242, 287 P. 2d 585 (1955); and has established the right of a child to sue for a prenatal

tort in *Mallison vs. Pomeroy,* 205 Or. 690, 291 P. 2d 225 (1955). Only in the *Cowgill* case, of all the five cases cited, was there any dissent from the decision of the Court. In the *Kleinschmidt* and the *Mallison* cases, the Court particularly noted that Article 1, Section 10 of the Oregon Constitution, provides for remedy by due course of law to every person for injury done to him in his person or reputation (201 Or. at p. 415; 205 Or. at p. 697).

Moreover, in *Smith vs. Smith,* 205 Or. 286, 288, 287 P. 2d 572 (1955), in denying a liability of one spouse to another for a negligent tort, and determining that the Constitutional provision above-cited did not apply, the Court quoted with approval the following language from the *Cowgill* case:

> " 'Whatever may be the early common rule, we should not be bound thereby unless it is supported by reason and logic. The law is not static. It is a progressive science. What may have been a wholesome common law rule a hundred years ago may not be adapted to the changed economic and social conditions of this modern age. In *Rozelle v. Rozelle,* 281 N.Y. 106, 112, 22 N.E. (2d) 254, 123 A.L.R. 1015, it is said:
>
> > " ' "The genius of the common law lies in its flexibility and in its adaptability to the changing nature of human affairs and in its ability to enunciate rights and to provide remedies for wrongs where previously none had been declared." '
>
> "Again, in the concurring opinion of Justice Rossman, we read:
>
> " ' * * * Society is not static and conduct is in a continuous state of flux. Mankind is constantly

> altering the social value it places upon different phases of life. The law must keep pace with life and develop with the expanding enlightenment of th eage.' 189 Or 282, 302."

Plaintiff does not suggest that these decisions furnish any authority for the Court in this case to hold that a duty here exists which was not recognized at common law. It is merely intended to establish that the Oregon Court is aware of its common law power and responsibility to make reasonable adaptations of the rights and liabilities of the citizens of its state to changing economic and social conditions; and that it has not been afraid of what has been called "judicial legislation" when such action by a court is not only approved by the weight of legal scholarship but appears desirable and just. Let us, therefore, examine what legal scholars have to say on the subject in question.

F. Legal Scholars Find the Trend in the Direction of a "Duty" to Exercise Reasonable Care.

Significantly enough, the A.L.I. Restatement, long recognized as an authority by the Oregon Courts, although recognizing the general rule that a landowner is not responsible for dangers caused by natural conditions on his land, expressly excepts the present situation from the rule and states:

> "The Institute expresses no opinion as to whether a possessor of land who permits trees not planted by himself or his predecessors to remain on a part of the land near a public highway is or is not under a duty to exercise reasonable care to prevent their condition becoming such as to involve a grave risk of causing serious bodily harm to those who use

> the highway and the burden of making them safe is not excessive as compared with the risk involved in their dangerous conditions." 2 Restatement, Torts, 985, Sec. 363.

In other words, while taking no stand, the Restatement recognizes the possibility of a distinction between the tree situation and other natural conditions.

Professors Harper and James, The Law of Torts, Vol. 2, pp. 1522-1525, Sec. 27.19, state:

> "According to the statements once widely made by commentators, the occupier's duty to prevent injury to persons or property outside his land from natural conditions on his own land is limited, if it exists at all."

The authors then go on to point out that this rule has not been uniformly followed, and assert:

> "Indeed in the common case of trees which may fall or break and do damage outside the land, the rule in England and probably in most of our states today requires the occupier to use ordinary care to remedy a known dangerous condition, and probably even to discover it. The cases do not seem to pay much attention to the question whether the tree was planted or just grew. There is some indication, however, of a greater willingness to impose the duty in thickly settled than in rural or forest areas where the danger would be less and the burden of precaution greater."

In Prosser on Torts (2d ed.) p. 431, Sec. 75, the author states that the rule of non-liability for natural conditions was a practical necessity in the early cases and remains a necessity in rural communities. He suggests, however, that the ordinary rules as to nuisance should apply in the case of natural conditions, "and that it is

a question of the locality, the seriousness of the danger, and the ease with which it may be prevented."

Both of these works cite an artcle by Professor Goodhart, "Liability for Things Naturally on the Land," 4 Camb. L. J. 13 (1930), and one by Dix W. Noel, "Nuisances from Land in its Natural Condition," 56 Harv. L. Rev. 772 (1943). In the latter article, the subject of falling trees is discussed at pp. 786-791 and the author concludes:

> "It is clear that the prevailing rule of non-liability for natural trees has received a distinctly limited application with reference to trees which endanger persons or property on the public highway. Where the tree is actually known to be dangerous, it seems to be established that the landowner is under a duty to make it safe. * * * With reference to rural property the rule is not so clear but there is considerable authority for imposing on the owner even of country property a duty to use care in discovering the danger. With the great increase of travel in modern times, and the growing tendency to protect travelers, the imposition on the landowner of the burden of due care in removing such menaces, according to nuisance principles, would seem to be justified in view of the grave harm threatened to users of the highways."

It is respectfully submitted that, despite the apparent reluctance of Dean Prosser to apply the rule to rural land, the standard remains the same in all of these discussions. Rural land, because of its remoteness, may require less care, but the landowner is not entitled to abdicate his responsibility to the public altogether. Furthermore, it is entirely possible that a different rule should be imposed upon a mere rural landowner with

trees on his land, and a landowner maintaining stands of commercially valuable timber for their economic benefit to him. In one case, the trees are a casual incident of the land; in the other, they are its major asset. The difference in economic value would be reflected in the degree of care which would be reasonably required.

G. The Trial Court's Legal Analysis Was Erroneous.

When all of the foregoing is applied to the facts of this case, we submit that it must be determined that the trial court followed the wrong rule of law. It is established that the tree in question had been dead for fifteen or twenty years (R. 62). It is established that it was visible from the highway, although how readily visible is a subject of some dispute (R. 40). Nevertheless, you could tell from the highway that a tree was dead (R. 40). It is admitted that no inspection or attempt at inspection was made (R. 10). It is established that, although in a rural area, the location in question was not far from a community (R. 52); it was near certain tourist facilities (R. 52); it was on the highway between two small towns in Oregon (R. 36), and could reasonably be described as "heavily-traveled" (R. 53-54), and it was traveled hundreds of times annually by employees of the Forest Service (R. 39, 41). It is admitted that an examination of the tree would have revealed that it was rotted and likely to fall (R. 48-49). Under these circumstances, we respectfully submit that questions of fact arose as to whether a reasonably prudent man, as the owner of this timber, would have conducted such an inspection as would have dis-

closed the existence and danger of this tree, and would have done something about it. The record also presents questions of fact as to whether the failure to make such an inspection was the proximate cause of the injuries to plaintiff. The trial court, however, failed to make these factual determinations, because he proceeded from the premise that there was no duty to inspect and hence that the admitted failure to do so was not negligence (R. 28-29).

The application of an erroneous principle of law basic to plaintiff's cause of action vitiates the entire decision of the trial court. Cf. *Wilson vs. United States,* 250 F. 2d 312, 324 (C.A. 9, 1957). It is respectfully submitted that this case must be remanded to the trial court with instructions to apply to the government's admitted failure to inspect the trees growing along the highway the appropriate standard, and determine whether the failure to inspect was, under the facts presented in this case, a negligent omission proximately causing the plaintiff's injuries. If such it was, plaintiff is entitled to recover his damages.

CONCLUSION

Plaintiff respectfully submits that the standard of reasonable care applies to this situation as well as to virtually all others presented in tort law. If the issue were to be presented to the Oregon Supreme Court, it is respectfully submitted that they would so determine.

This being the case, the decision of the court below is erroneous, and its judgment should be reversed and the caues remanded for a new trial.

Respectfully submitted,

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Attorneys for Appellant.

APPENDIX

TABLE OF EXHIBITS

Exhibit No.	Identified	Offered	Received or Rejected
Pf. 2	R. 17, 18		
Pf. 6	R. 17	R. 47	R. 47
Pf. 7	R. 17	R. 35	R. 35
Pf. 11	R. 17, 55		
Df. 1-17	R. 18	R. 69	R. 69
Df. 18	R. 18, 43		
Df. 21	R. 18	R. 70	R. 70
Df. 24-26	R. 18	R. 70	R. 70
Df. 27-34	R. 18	R. 70	R. 70